In the Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 154.

THE WINTHROP IRON COMPANY *et al.*,
Appellants,

vs.

ARTHUR B. MEEKER, *et al.*,
Appellees.

MOTION AND STIPULATION.

Now comes R. D. Mussey, solicitor and of counsel for the appellants herein, and shows unto the Court the following stipulation this day filed:

SUPREME COURT OF THE UNITED STATES.
October Term, 1886. *No.* 154.

THE WINTHROP IRON COMPANY AND OTHERS,
Appellants.

vs.

ARTHUR B. MEEKER AND OTHERS,
Appellees.

It is hereby stipulated that an order may be entered herein reversing the Decree entered by the Court below at the cost of said appellants, and without any costs to be taxed against appellees, or either of them, and that said cause may be remanded to the Court below, and that after the docketing of said cause in the Court be-

low the defendants below (Appellants in this Court) shall pay and satisfy all the costs incurred and not heretofore paid by the complainants in said cause, being the costs, fees and expenses of all officers of said Court in said cause. After which payment the said suit shall be dismissed at the costs of said Defendants and without any costs as against the complainants.

FREDERIC ULLMANN,
Sol. for Appellees.

R. D. MUSSEY,
Sol. for Appellants.

Chicago, Jan'y 18, 1887.

And thereupon he moves the Court for an order reversing, by consent, the decree heretofore rendered herein by the Circuit Court of the United States for the Western District of Michigan, the appellants to pay the costs of this appeal, and remanding the cause to the said Circuit Court, with instructions to said Court to dismiss the cause at and upon the payment by the Defendants (appellants here) of all the costs incurred in said Court, whether by Complainants or Defendants, and not heretofore paid; and that upon the full payment by said Defendants (appellants here) of all costs in this case, whether in this Court, or the said Circuit Court, the Bond filed in this Court by the Appellants (Defendants below) be delivered up to them to be cancelled.

Solicitor and of Counsel for Appellants.

Washington, D. C., January 24, 1887.

122-685

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

No......

The Winthrop Iron Company, et al.
Appellants,

VS.

A. B. Meeker, et al.
Appellees.

BRIEF FOR APPELLANTS

ON

MOTION TO DISMISS.

R. D. MUSSEY,
OF COUNSEL.

WASHINGTON, D. C.
R. BERESFORD, PRINTER, 523 SEVENTH STREET.
1883.

This Case comes before the Court under the following circumstances:

Judge Baxter holding the Circuit Court for the Western District of Michigan having passed a Decree adverse to the Defendants on the 6th of April, 1883, they asked an Appeal, which he refused on the ground that the Decree was Interlocutory and not Final.

On the 29th of April, 1883, Defendants applied to this Court for a Mandamus to compel the allowance of an Appeal. On the 7th of May, 1883, this Court issued a Rule directing Judge Baxter to show cause why an Appeal should not be granted, returnable at this Term, with leave to apply to Mr. Justice Matthews, (in whose Circuit the Case arose,) at Chambers, for an Appeal and Supersedeas. On the 31st of May, 1883, Mr. Justice Matthews heard the Application, allowed the Appeal, and granted a Supersedeas. At the hearing before him the Counsel for the Plaintiffs objected to the Supersedeas Bond as being insufficient in amount and the Defendants agreed to give one, if demanded, at this Term, in the penalty of $100,000.

The question involved by the Mandamus proceedings being solely

> Whether the Decree sought to be appealed from was a Final Decree,

and Mr. Justice Matthews having allowed an Appeal, it has been a matter of Stipulation between Counsel that the Mandamus proceedings be discontinued and the question therein involved be presented upon Motion, made by the Plaintiffs, to dismiss the Appeal.

Is the Decree a final one in the sense of the law regulating the appellate jurisdiction of this Court?

While, in Law cases, there is no difficulty in determining whether the judgment sought to be reversed, is final,

> it has not always been easy to decide when decrees in equity are final within this rule,

to cite the language of this Court in *Bostwick* v. *Brinkerhoff*, 106, U. S., 4.

Hence it is that the Appellees differ here not only with the Appellants, as was to have been expected, but also with Mr. Justice Matthews, whose *frank and free conviction that the Decree was final* is met by the Appellees with a learned review of some (not all) the cases before this Court in which this question has arisen.

When the Application for a Mandamus was made Counsel for the Petitioners had before him only an Abstract of the Pleadings. Based upon these were the following remarks:

> The case made by the petition must appeal strongly to the equitable instincts of this Court.
>
> The Bill is by a Minority of the Stockholders to avoid the action of a Majority against which no remonstrance was made to the Corporation.
>
> The objectionable action was a lease of the Corporation property, which did not by its terms begin until December last. The case was heard in October last, and a decision was promised for December. That Decision was not made at that time, and the lease not having been declared void the Lessees used the Winter Season for necessary preparation.
>
> Just as the shipping and active producing season begins a Decree is rendered which dispossesses the Lessees, and the Company, of the property and, if it is to be held interlocutory, prevents those who have made expenditures and preparations from completing their arrangements and works disaster against which no indemnity has been provided.
>
> The delay of the decision from December to April has prevented an earlier application to this Court, and the necessary haste with which this application has been made prevents a full discussion of the vital question whether the Decree complained of is *Interlocutory*,

as held by the learned Judge who denied the Appeal, or *Final*, within the judicially ascertained intent of those terms.

An analysis of the abstract of the Pleadings made in the Petition shows that the objective point—the main purpose—of the Bill was the annulling of the Lease. Joined with this were the minor objects of the removal of certain Directors, an injunction against certain work, and the appointment of a Receiver. The Court decreed the lease void, and was silent as to the removal of Directors and the work on the deep shaft. So far as the main object is concerned the Decree is plainly final.

An accounting is also asked for. But from the statement of the Bill there seems nothing in it on which to grant the Prayer.

The Decree does provide for an accounting, covering, it should be borne in mind, the period from December, 1882, to April, 1883, when the Defendants were in possession under the new lease, because the Court failed to render its decision, as promised, in the month that lease began to operate. It also appoints a Receiver as a substitute for the Directors, (and, indeed, as a substitute for the Company,) and as a finality rather than a temporary expedient. He is to have all the property, do all the work, and, apparently, to be the successor of the corporate entity of the Winthrop Iron Company, which is ousted of possession, control, and the exercise of corporate functions.

If this is not "final," what is? What can it be? The Courts of Michigan—of which State this Winthrop Iron Company is a creature—have held such an appointment to be a "finality" for appeal purposes, even when made by an order.

Barry v. *Briggs*, 22 Mich., 201.

The vigorous opinion of Ch. Justice Campbell in this case is strongly commended to the attention of the Court in connection with the consideration of the present application.

If these two main points in the Decree—the cancelling of the lease and the appointment of a Receiver—impress upon the Decree "finality," does the direction for "accounting" give it a preponderating "interlocutory" character?

It is submitted that the Accounting and the Reference to the Master are very similar to that passed upon in *Forgay* v. *Conrad*, 6 How., 201, which is cited and commented on in *Beebe et al.* v. *Russell*, 19 How., 283.

The language used by Mr. Justice Wayne in the latter case would seem to be applicable here:—

> The fact is, the order of the Court in that case for referring it to a Master was *peculiar*.

The attention of the Court has already been directed to the fact that Paragraph V. of the Decree directs an accounting from December 1, 1882, to the date of the Decree; and that this period embraces the time when the defendants were in possession under the Lease, which began to operate December 1, 1882, and which it was the chief object of the Bill to prevent going into effect.

The case was heard in October, 1882, and if the Court had decided it in December, 1882, as promised, there would have been no need of an accounting for this period.

It is but just to state that though the paragraph cited refers to this period for the accounting, some of the clauses of that paragraph contemplate an accounting between some of the parties to the bill antecedent to that as a preparation—so to speak—for the accounting rendered necessary by the delay of the Court in making its decision.

While this Court properly discourages immature appeals, it would seem to be equally proper that it should not countenance a construction of its appellate jurisdiction which will leave it in the power of the Circuit Courts, by postponing action on ancillary and minor and subordinate details of a litigation, to indefinitely delay a review of their decisions of the substantive points at issue. And especially in cases where the party in whose interest such delay appears to be had, gives no security to indemnify the other for the injury he may suffer while the latter stands ready to give such indemnity to his opponent if, only, he may have a review of the error he alleges.

After a careful perusal of the learned Brief of opposing Counsel, and in the further light thrown by the full Plead-

ings and the Opinion of his Honor, Judge Baxter, the conviction expressed in the foregoing remarks is not weakened.

The case as made in the Bill is this. The Winthrop Iron Company in 1877 leased its property at a certain royalty until December 1st, 1882, to the St. Clair Brothers, who assigned the lease to the Winthrop Hematite Company, a corporation of which they were the promoters and chief stockholders. With a fraudulent intent against the Winthrop Iron Company in which they were stockholders, these St. Clair Brothers bought up a majority of its stock, had a meeting of the Company called, at which new Directors were made; certain expenditures on a deep shaft authorized; the principal place of business of this (Michigan) Company changed from Chicago, Illinois, to Ishpeming, Michigan; and a seventeen years' lease of its property ordered from the Winthrop Iron Company to the Winthrop Hematite Company, to commence at the expiration of the first lease, namely, December 1st, 1882.

THE BILL was filed November 19, 1881. Its objects as expressed in the Prayers, which (exclusive of that for General Relief) are Six in number, are as follows:

1. The nullification of the meeting of the Iron Company* referred to and the action there had, and an accounting between the Iron and Hematite Companies and their respective stockholders.
2. The amotion of the new Directors of the Iron Company.
3. An injunction against the Iron Company's proceeding with work on the deep shaft.
4. An injunction against the Iron Company's making the new lease to the Hematite Company.
5. Such injunctions as are prayed for permanently to be made *pendente lite*.
6. For a receiver of the Iron Company.

* For convenience this Brief will speak of the "Winthrop Iron Company" as the "Iron Company," and the "Winthrop Hematite Company" as the "Hematite Company."

THE ANSWER denies all fraud, both generally and specifically, and is fully responsive to the Bill. The only point, however, necessary to the present discussion is that the Answer showed that the Lease sought to be forbidden from the Iron Company to the Hematite Company had been executed before the Defendants had notice of the filing of the Bill.

The OPINION of Judge Baxter is now presented to the Court by the Appellees, and may be referred to by them as showing the intention of that learned Judge in respect of the Decree he was about to make. (See pp. 32 and 33 of Appellees' Brief.) But it is submitted that it is not his *intention* which, at this time and on this motion, and under these circumstances, this Court can consider. It is his *Act* which is to be construed.

This controversy hinges upon the *Decree* which he signed and not upon the *Opinion* which he delivered.

An examination of that Decree shows it to be couched in phraseology more appropriate to a final Decree than to an Interlocutory Decree or Decretal Order. Paragraph VI of the Decree is as follows:

> And the Court reserves to itself such further directions as may be necessary to carry this decree into effect; concerning costs; or as may be equitable and just.

This is not the language by which a *cause* is reserved for a Final Decree upon the incoming of certain reports, testimony, &c. It is the assertion of the right of the Court to make such

directions as may be necessary to carry a decree into effect,

bearing a striking analogy to the langauge used by Chief Justice Chase (on Circuit) in his decree in the case of *French and Shoemaker*, held by this Court (12 Wall., 86) to be a final and Appealable Decree, which is set out on pp. 91, 92 of the Report, viz.:

> Leave is given to either party to apply at the foot of this Decree for such further Order as may be necessary to its due execution, or as may be required in relation to any matter not finally determined by it.

And what in respect of phraseology is true of the 6th paragraph applies with full force to the Introduction, and some of the clauses or paragraphs; and in a lesser degree to others. In a word—if it be an Interlocutory Decree—it has been run in a mold used for casting Final Decrees.

But it is not in form alone that this Decree bears marks of Finality. Its substance is impregnated with that character.

The relief sought against the Hematite Company was that the Iron Company should not execute the new lease to it. The 4th Prayer of the Bill is addressed directly to that end; and the 1st Prayer indirectly, but potentially, in seeking the nullification of the proceedings of the Special Meeting of the Iron Company at which the Lease was voted to be made. This relief is the main object of the Bill—the sole object so far as the Hematite Company is concerned—except a clause in the first Prayer, unsupported by any case made in the Bill, for an Accounting by this (and the other Company) with stockholders.

Paragraph I of the Bill is responsive to this purpose. It does not forbid the execution of the Lease—for that was an accomplished fact before Answer—but it does declare the Lease so made "null and void."

There all the jurisdiction of the Court over the Hematite Company *to be found in the Pleadings* was exhausted.

The sole interest in, and relation to, the case exhibited to the Court, of the Hematite Company, was passed upon, and so passed upon that nothing remained to give the Decree effect. The Entry of that Decree in the proper Records would have been as complete a destruction of the Lease as could have made by the most solemn act of either party to it, or both combined. No subsequent "directions" were "necessary to carry the Decree into effect." The law of the

case, the facts of the case, the merits of the case were all disposed of so far as the Hematite Company was concerned. For the Court did not, as it could not, on the pleadings, decree any accounting by the Hematite Company with its stockholders.

The finality of the Decree in respect of the Hematite Company was still further enforced by the appointment of a Receiver for the Iron Company to whom that Company and the Hematite Company were to deliver all books, property, &c., belonging to the Iron Company, so that not only was the Iron Company incapacitated from executing *any* lease to the Hematite Company in lieu of the one that had been declared null, but the Iron Company was in effect wiped out of existence. And, as was pointed out in the Remarks, (cited above,) submitted with the Petition for a Mandamus, action was taken which, under the law in the State of which the Company was a creature, was "final."

It is true that this Court has, in many cases, held an appointment of a Receiver to be an Interlocutory proceeding. But it is submitted with confidence, that such Receivers were temporary, for the purpose of protecting property pending litigation, and until final decrees could be made, and not Receivers appointed as the successors of corporations as the Receiver prayed for in the 6th Prayer of the Bill and instituted by Paragraphs II, III and IV of the Decree would seem to be. It is only those Receivers who are *Conservators* of a fund, an estate, a corporation, the creation of whom can properly be classed in the category of Interlocutory Action. Receivers who are *Liquidators* of an estate, a fund, a corporation are the result of Final determination and to effect a Final purpose. An Order creates the former to hold what is confided to them while the rights of claimants are being ascertained; the latter are called into being by a Decree after the ascertainment of those rights as a means of enforcing them. It is superficial and illogical, and undiscriminating to confound these two classes, or to hold because the majority of persons called Receivers belong to the former class that they all do.

While there may possibly be some room for a contention that the Receiver named in this Decree did not belong to the latter of the two classes of Receivers named above as to all the Defendants, it is too plain for argument that he sustained that relation in respect of the Hematite Company, the rights of which had been finally adjudicated.

Paragraph V. of the Decree provides for certain accounting, and the Appellees contend that until that accounting has been had, and the Court has sanctioned the Master's Report—this case is undecided by the lower Court and must remain there.

Attention is invited to what was said of this "Accounting" in the Remarks submitted with the Petition for Mandamus.

They are more than justified by the full Record. For the purposes of this hearing there have been printed only the Bill, Answer and Decree. The Decree bears date in April, 1883. The Lease, the Bill sought to prevent, was to have begun in December, 1882. The Bill filed in 1881 did not pray an accounting on the part of any one for the period intervening between December, 1882, and April, 1883. To have done that would have required the gift of prophecy.

The Answer, as has been shown, admitted the execution of the Lease, and therefore the Court had authority to respond to the Prayer that the Lease be not made, by cancelling it after it had been made. But neither by Bill, nor Answer, nor by any supplemental proceeding, petition, motion or affidavit does it appear that the Court had any information or suggestion even, that any entry had been made under that Lease, after the case was "heard" in October, 1882, and while it was *sub judice*, till the following April. Yet, in this conspicuous absence of ground on which to proceed the Court does Decree (Paragraph V.) an accounting by certain parties in respect of profits made from the mine,

realized since December 1st, 1882,

and gives a series of elaborate directions as to how such accounting shall be taken, treating that as a fact whose consequences are to be inquired into, of the existence of which not a hint appeared in the Record.

Possibly, the objection that all this was beyond jurisdiction of the Court, *on the case made before it*, would be more appropriate to the final hearing of the case here, than on this motion. That it should be stated now, if not discussed, is fit. For the fact of this Decree for this sort of accounting is relied upon by the Appellees as a support to their contention that the Decree is not Final; and one of the directions in respect of the accounting does, as was said, in the "Remarks" (supra)

> contemplate an accounting between some of the parties to the Bill antecedent to [December 1, 1882,] as a preparation—so to speak—for the accounting rendered necessary by the delay of the Court in making its decision.

It is not conceived by the Appellants that such direction for accounting will suffice to conceal the essentially final character of this Decree, the more so as this order of reference to a Master is, to cite Mr. Justice Wayne's comments on the *Forgay* and *Conrad* case, in pronouncing the opinion of the Court in *Beebe* vs. *Russell* (19 How., 283, 287,)

> *peculiar*, making it doubtful, if it could in any way control or quality the antecedent decree of the Court upon the whole merits of the controversy, or modify it in any way, *except upon a petition for a rehearing.*

It has not been thought necessary to reprint the decisions of this Court upon this subject of appealable finality in a Decree nor to review in detail those given in the learned Brief for the Appellees. The Appellants are ready to admit that this Court rightly desires cases that are to be presented to it, to be ripe for its consideration; and that it justly discourages the splitting of cases, and the consequent transference of *nisi prius* litigation to this high Appellate tribunal.

But this Court will not, it is confidently assumed, deny an Appeal to a party whose rights have been finally passed upon, because the Decree which ascertained them also directed an inquiry to be made by a Master, concerning the consequences of a supposed fact not brought to the attention of the Court by the pleadings, and which, if it existed, existed only because the Court below, by its omission for months to decide upon *the* case made before it, gave an opportunity for its happening.

The Appellees in their Brief inform the Court that the Appellants will "chiefly rely" upon the case of *Forgay* vs. *Conrad*, (6 How., 201.) We do rely upon it as an adjudication recognizing the fact that a Court sometimes passes a Decree which is so final, judged by the acknowledged standards, as to be appealable where it would have been possible and more orderly to have passed an Interlocutory Decree, or Order, announcing conclusions in accordance with which, after inquiry had into, and an ascertainment of, certain subordinate or collateral facts a final decree would, in due time, pass.

The Appellees' Brief does not give the whole of the Opinion in the *Forgay* and *Conrad* case. There is a portion of it so applicable to this case, that attention having been directed to it, it will be quoted:

> * * * We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case, and every matter in controversy in it, decided in a single appeal.
>
> In this respect the practice of the United States Chancery Courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the Chancellor, which decides a right of property in dispute; and, therefore, there is no irreparable injury to the party by ordering his deed to be canceled, or the property he holds to be delivered

up, because he may immediately appeal; and the execution of the order is suspended until the decision of the Appellate Court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the circuit courts of the United States, in framing their interlocutory orders and in carrying them into execution, should keep in view the difference between the right of appeal as practiced in the English chancery jurisdiction, and as restricted by the Act of Congress, and abstain from changing unnecessarily the possession of property; or compelling the payment of money by an interlocutory order.

Cases, no doubt, sometimes arise where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into Court. But orders of this description stand upon very different principles from the Interlocutory orders of which we are speaking.

In the case before us for example, it would certainly have been proper and entirely consistent with Chancery Practice for the Circuit Court to have announced, in an Interlocutory order or Decree, the opinion it had formed as to the rights of the parties, and the Decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity for passing immediately a Final Decree, annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The Decree upon these matters might and ought to have awaited the Master's report; and when the accounts were before the Court, then every matter in dispute might have been adjudicated in one final Decree; and if either party thought himself aggrieved, the whole matter would be brought here, and decided in one appeal, and the object and policy of the Acts of Congress upon this subject carried into effect.

These remarks are not made for the purpose of censuring the learned Judge by whom this Decree was pronounced, but in order to call the attention of the Circuit Courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this Court as altogether inconsistent with the object and policy of the Acts of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated by successive appeals to produce great and unreasonable delays in suits in Chancery. For it may well happen that, when the accounts are taken and reported by the Master this case may again come here upon exceptions to his report, allowed or disallowed by the Circuit Court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one.

Respectfully submitted.

R. D. MUSSEY,
For Appellants.

WASHINGTON, D. C., *October* 15, 1883.